HARVARD
LAW REVIEW

VOL. VII. APRIL 25, 1893. NO. 1.

ALTERATION OF NEGOTIABLE INSTRUMENTS.

[The following examination of this subject is part of a chapter of a work on "Bills and Notes," for the Students' Series, by MELVILLE M. BIGELOW, Esq. Only the more important of the cases are cited.]

ANOTHER case of want of contract arises where there has been a material unauthorized alteration of the instrument to which the defendant gave his signature. The authorities in general declare that to alter the terms, written or printed, of a negotiable note, bill, or check, after the defendant's signature was written to it, is to destroy its validity against him, even in the hands of a *bona fide* holder for value. The reason is plain. The altered instrument is not the one he signed; and the identity of the one signed has been destroyed.[1]

A material alteration within the meaning of the rule stated may be defined thus: Any alteration (1) changing the legal effect of the instrument; (2) made with such intent, or being a final act; (3) without consent; (4) by a party to it, or by one in lawful possession of it, — is a material alteration. The divisions of the definition, as here given, will serve as basis of an analysis of the subject.

[1] Wade *v.* Withington, 1 Allen, 561; Draper *v.* Ward, 112 Mass. 315; Aldrich v. Smith, 37 Mich. 468.

First, then, of alterations "changing the legal effect of the instrument." It was at one time considered, and it is still occasionally intimated, that a fraudulent alteration, material or not, would destroy the instrument, because perhaps of the wrongful intent;[1] but that doctrine has been generally abandoned. An immaterial alteration, then, cannot, by the current of authority, have the effect to prevent recovery upon the paper. For example: The plaintiff is holder for value, and the defendant maker of a promissory note sued upon, which does not state any time of payment. The plaintiff afterwards writes in the words "on demand," without the defendant's consent, and with fraudulent intent. The plaintiff is entitled to recover, notwithstanding the alteration, the note being originally payable on demand in legal effect.[2] Again: The plaintiff is holder for value of an instrument made by the defendant, promising to pay a certain sum of money, upon a condition expressed therein, to a person named. The payee afterwards writes in the words "or bearer," without the defendant's consent. The defendant's liability remains unchanged; the contract, being incapable of negotiability as it was executed, could not be made negotiable by adding the words in question.[3]

A like case would be made where, after a change of law not governing the instrument in question, an alteration in it is made, expressing no more than what was embraced in the law by which the instrument was governed.[4] Another case of the kind would arise where an alteration was made conforming to the true intention of the parties, correcting a mistake in the writing.[5] So to add the words "with grace" to paper entitled by law to grace, or "without grace" to paper not entitled to grace; and so to add the legal rate of interest, as at "six per cent," after the words "with interest:" such additions are immaterial; they have no effect upon the validity of the instrument. In such cases it makes no difference whether

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[1] Pigot's Case, 11 Coke, 27 *a*, 2d resolution. The word "fraudulent" is not there used; the language is, "if the obligee himself alters the deed, . . . although it is in words not material, yet the deed is void." No doubt "fraudulent" must be understood.

[2] Aldons *v.* Cornwell, L. R. 3 Q. B. 573, overruling Pigot's Case, 2d resolution. See Goodenow *v.* Curtis, 33 Mich. 505; Curtis *v.* Goodenow, 24 Mich. 18. But see Bridges *v.* Winters, 42 Miss. 135.

[3] Goodenow *v.* Curtis, and Curtis *v.* Goodenow, *supra*.

[4] Bridges *v.* Winters, 42 Miss. 135.

[5] McRaven *v.* Crisler, 53 Miss. 542; Clute *v.* Small, 17 Wend. 238; Hervey *v.* Harvey, 15 Maine, 357. But see Miller *v.* Gilleland, 19 Penn. St. 119, by a divided court.

the defendant has consented to the alteration or not; and so of all other cases in which the alteration is immaterial.

It would be difficult to show what alterations are such as to change the legal effect of the instrument in any other way than by specific cases. And then, too, it should be remembered that we are dealing with but part of the definition, and that all the other parts of it must also be met to make a material alteration. In other words, though in a particular case the alteration appears to change the legal effect of the instrument, it may appear that it was not "made with such intent, or being a final act," or one of the other facts may be wanting to make it material.

The following are some of the cases in which the alteration changes, or appears to change, the legal effect of the instrument: An alteration of the date of the instrument;[1] changing "I promise" to "We promise," for such change would convert a several, or a joint and several, into a joint promise;[2] the addition of an interest clause to an instrument completed without it,[3] as, for example, "to bear legal interest,"[4] or "interest payable annually," or "semi-annually," "quarterly," or otherwise;[5] striking out the words "after maturity" where interest is made so payable;[6] changing the name of the payee;[7] changing "to the order of A" to "to A or bearer;"[8] adding the words "payable at the Bank of S.,"[9] though it seems that an acceptor may make a bill payable at no designated place payable at any particular place he will within the town in which by law it is payable;[10] adding another name to that of the maker of a note,[11] though the case appears to be differ-

[1] Vance *v.* Lowther, 1 Ex. D. 176; Wood *v.* Steele, 6 Wall. 80; Britton *v.* Dierker, 46 Mo. 591; Emmons *v.* Meeker, 55 Ind. 321; Kennedy *v.* Lancaster Bank, 18 Penn. St. 347.

[2] Humphreys *v.* Gwillow, 13 N. H. 385.

[3] Holmes *v.* Trumper, 22 Mich. 427; Glover *v.* Robbins, 49 Ala. 219. As to filling blanks in such cases, see *infra.*

[4] Lochnane *v.* Emmerson, 11 Bush, 69.

[5] Marsh *v.* Griffin, 42 Iowa, 403; Blakey *v.* Johnson, 13 Bush, 197; Lamar *v.* Brown, 56 Ala. 157.

[6] Brooks *v.* Allen, 62 Ind. 401.

[7] Stoddard *v.* Penniman, 108 Mass. 366; S. C. 113 Mass. 386.

[8] Union Bank *v.* Roberts, 45 Wis. 573.

[9] Southwark Bank *v.* Gross, 35 Penn. St. 80; Nazro *v.* Fuller, 24 Wend. 374; Whitesides *v.* Northern Bank, 10 Bush, 501; Burchfield *v.* Moore, 3 El. & B. 683.

[10] Troy Bank *v.* Lauman, 19 N. Y. 477. See Todd *v.* Bank of Kentucky, 3 Bush, 626; Whitesides *v.* Northern Bank, *supra;* of the right of an accommodation acceptor of a bill payable generally to designate a particular place of payment.

[11] Hamilton *v.* Hooper, 46 Iowa, 515; Lunt *v.* Silver, 5 Mo. App. 186; Haskell *v.*

ent where another surety is added, before delivery, to a note or bill already executed by a surety;[1] adding an attestation clause, for that produces a possible and probable change in the evidence of execution, proof of the signature of the attesting witness proving the execution.[2]

"Made with such intent, or being a final act." — It may be that the alteration was the result of an accident, as where the intention was to make the change in another instrument; or it may be due to mistake in regard to the terms of agreement, or in computation of amount, or in some other particular. When that is the case, it seems that the identity of the instrument is not destroyed. If the new words have been added merely, they may in principle be struck out by the one who added them on discovering the facts; or if they are written over an erasure of the original words, and the original words cannot well be restored, they may stand, and the explanation given at the trial.[3]

The right to make such correction appears to be limited to the person who made the change, including possibly his agents and personal representatives. After the paper had passed from his hands it is too late, for his indorsee will have taken the paper as altered, and the only right he can have is upon the altered paper. He did not take it as it stood originally, and hence cannot restore it to its original form, even where that would be physically practicable. The alteration has been allowed to stand by the party who made it, and so has permanently changed the paper; it has become "a final act." Nor would it make any difference, it seems, that the party who made the alteration did not discover his mistake until after he had transferred the instrument; after transferring it his rights over it are gone.

The difference between material alterations made by mistake, and alterations made with intent to change the legal effect of the instrument, is plain: in the case of mistake, the object of the act is to restore the writing to the terms agreed upon; in the case of

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Champion, 30 Mo. 136; Crandall *v.* First Nat. Bank, 61 Ind. 349; Wallace *v.* Jewell, 21 Ohio St. 163; Gardner *v.* Walsh, 5 El. & B. 83.

[1] Crandall *v.* First. Nat. Bank, *supra;* Keith *v.* Goodwin, 31 Vt. 268, distinguishing Gardner *v.* Walsh, *supra*, and like cases, on the ground that the addition was made after the instrument had been delivered.

[2] Adams *v.* Frye, 3 Met. 103.

[3] Compare Horst *v.* Wagner, 43 Iowa, 373; Krause *v.* Meyer, 32 Iowa, 566.

intelligent intention to change, the object is to destroy the writing as evidence of the terms actually agreed upon. That will serve to explain some of the apparent contradictions of the authorities. Thus, it is laid down that a material alteration by a party will destroy the instrument whether it was fraudulent or not;[1] and it is also laid down that a material alteration will *not* destroy the instrument if it was not fraudulent.[2] Both statements are true. The case usually presented is one in which the alteration was suffered to remain, and the paper passed as altered to the plaintiff. The alteration is final, and authority conforms to principle, that the plaintiff, though a *bona fide* holder, cannot maintain an action in such a case against any of the non-consenting parties who signed the paper as it stood before the alteration. For example: The plaintiff is payee for value of what purports to be a promissory note signed by the defendants. The instrument originally read, "For value received *I* promise to pay," etc., "with interest," and so was signed by two persons, the defendants. The note thus executed was for the benefit of the first signer, who afterwards changes the word "I" to "we," and adds after the word "interest" the words "at twelve per cent," without the other defendant's knowledge, supposing himself to have the right to do so; the rate of interest not having been agreed upon when the note was executed, but being afterwards fixed between the first defendant and the plaintiff as inserted. Then the instrument so altered is delivered to the plaintiff. The plaintiff is not entitled to recover against the second defendant, either upon the instrument in its altered or in its original form, though the alteration was not fraudulent.[3]

Hence the first of the two apparently contradictory propositions is true. But the party having made an innocent mistake in making the alteration may, while the instrument is still in his own hands, discover his mistake and desire to correct it, restoring the instrument to its original state. The alteration not having become final, that may be done, or the case may be treated as if it had been done, or as if no alteration had been made, if actual restoration is impracticable. Hence the second of the two propositions also is correct. This explanation may not indeed align with some of the authorities, for the second proposition has misled the courts in some cases, causing them to hold in general that material alter-

[1] Draper *v.* Ward, *supra.*

[2] Kountz *v.* Kennedy, 63 Penn. St. 187.

[3] Draper *v.* Ward, *supra.*

ations which are not fraudulent are not fatal to the instrument; but the explanation, it is believed, shows a sound distinction.[1]

The general rule, then, may be expanded and stated thus: If the bill, note, or check be altered in a material particular, either by fraud or by an innocent mistake not corrected while the paper is in the hands of the party who made the alteration, it will be destroyed towards all non-consenting parties, and that, too, whether the alteration was made by the party claiming under it, or by any other party to it. And no action can be maintained against non-consenting parties, either upon the altered instrument or upon the instrument as it stood before alteration, even by a *bona fide* holder for value.[2] The fact that the instrument may have been restored to its original form (after having been passed with the alteration) makes no difference.[3] Nor is the alteration to be deemed immaterial by reason of the fact that it is favorable to the defendant,[4] for still its legal effect is changed, and the identity of the contract signed is destroyed.[5]

"Without Consent." — Consenting parties cannot set up an alteration; and, among others, all who have signed the contract after the alteration are consenting parties, with one exception, to be stated presently. Thus, if an alteration in the date of a bill of exchange was made with the consent of the acceptor, or if he subsequently assented to it, he will be bound; and so will all other parties to it becoming such after the alteration, while the prior non-consenting parties may repudiate the instrument.[6]

The exception referred to arises in the acceptance of a bill of exchange. A bill may have been altered after it left the drawer's

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1 The Pennsylvania courts permit recovery by a *bona fide* holder for value to the amount of the instrument as originally executed, when the sum has been raised in such a way as not to excite the suspicion of a man in ordinary business. Worrall *v.* Gheen, 39 Penn. St. 388; Garrard *v.* Haddan, 67 Penn. St. 82; Phelan *v.* Moss, Id. 59. See also Brown *v.* Reed, 79 Penn. St. 370; Neff *v.* Horner, 63 Penn. St. 327. That is very well if the alteration was not fraudulent or otherwise final; but the Pennsylvania cases do not make the distinction.

2 See, besides the cases *supra*, Smith *v.* Mace, 44 N. H. 553; Holmes *v.* Trumper, 22 Mich. 427; Greenfield Bank *v.* Stowell, 123 Mass. 196; Citizens' Bank *v.* Richmond, 121 Mass. 110; Woolfolk *v.* Bank of America, 10 Bush, 504, 517; Morehead *v.* Parkersburg Bank, 5 W. Va. 74; Burchfield *v.* Moore, 3 El. & B. 683.

3 Citizens' Bank *v.* Richmond, *supra*.

4 Humphreys *v.* Gwillow, 13 N. H. 385, 387.

5 Id.; Draper *v.* Ward, 1 Allen, 561; Chism *v.* Toomer, 27 Ark. 108.

6 Paton *v.* Winter, 1 Taunt. 420; Tarleton *v.* Shingler, 7 C. B. 812.

hands and before acceptance; in such a case, though the acceptor appears to have accepted the bill in its altered form, he has not done so in law, — he has presumably intended to accept the bill which the drawer drew. If he accepted the bill without notice of the alteration, and without negligence, he is not bound by his act. For example: The defendants being *bona fide* holders for value of a bill of exchange drawn upon the plaintiffs, the bill is presented to the plaintiffs for acceptance, and accepted, an alteration of the sum payable, of the date, and of the payee's name, having been made in it after it passed from the drawer's hands and before acceptance. The acceptance was without notice of the alteration, and without negligence. Afterwards the plaintiffs pay the bill, and then, on discovering the alteration, bring the present suit to recover back the sum paid. They are entitled to recover.[1]

The reason is plain. The drawee of a bill of exchange accepts, if he does accept, on the ground that payment by him gives him the right to charge the amount to the drawer as payment made upon the drawer's order;[2] he would not accept, except upon that footing, or the undertaking of some one else to protect him. But where the bill is altered after it has left the drawer's hands, the acceptor cannot on payment make such charge; the drawer has not directed him to pay the altered bill. Acceptance then is not an admission of the genuineness of the contents of the bill so as to work an estoppel against him in favor of a *bona fide* holder for value.

If, however, the drawer himself has altered the bill, or consented to the alteration of it, after drawing it, the case will be different, for he will then have directed the drawee to accept and pay the bill as altered. That distinction must be taken as the explanation of one or two cases, which at first may seem to hold broadly, that acceptance of an altered bill makes the acceptor liable upon the bill as altered. For example: The plaintiff is payee of a bill of exchange accepted by the defendant and now sued upon. The bill as originally drawn was payable three days after date, and in that condition was indorsed by the payee for the accommodation of the drawer, who now changes the word "three" to "thirty," and passes

[1] Compare Bank of Commerce *v.* Union Bank, 3 Comst. 230, bill paid at sight. See Clews *v.* Bank of New York, 89 N. Y. 418. Acceptance is an admission of the drawer's hand (as will be seen later), but not of the rest of the writing. Id.

[2] Compare the language of the court in Hortsman *v.* Henshaw, 11 How. 177.

the bill to A. The fact is afterwards discovered, and an arrangement made by which the bill is returned by A to the plaintiff; then it is accepted by the defendant without knowledge or notice of the alteration. The defendant is liable.[1]

"By a party to it, or by one in lawful possession of it." — An alteration made by a stranger has no effect upon the validity of the instrument if it is possible to show what its language was before the act; the alteration must be made by a party, or by one in lawful possession, — all others are strangers, — in order to destroy the instrument.[2] By a "party" is meant any one who has placed his signature to it, or has been owner of or interested in the instrument; by "one in lawful possession," any one to whom the owner or other person interested in the instrument has intrusted it.[3]

If the blank has been wrongfully filled by one who has been intrusted with the instrument, with power to fill the blank or not in a certain contingency, the act will not constitute a material alteration, though the paper was delivered as complete. The case is one of agency, and the party whose confidence has been betrayed — that is, the principal — will be bound in favor of a *bona fide* holder for value.[4] That assumes, however, that no alteration of the written or printed language is made,[5] unless the facts indicate an authority to alter.[6]

The mere fact that one who has been acting as authorized agent of the defendant made the alteration, will not bind the supposed principal, for agency confers no authority to commit a crime.[7] No relation of agency exists between co-signers, as such, of an instrument; and hence an alteration made by one co-maker of a promissory note without the consent of others, though before delivery,

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[1] Ward *v.* Allen, 2 Met. 53. There were other complicating facts in this case, but they have no bearing upon the point now under consideration. The first headnote of the case is too broad. In Langton *v.* Lazarus, 5 Mees. & W. 629, also, the alteration was made by the drawer. That must be understood as the essential fact in reference to the acceptor's liability.

[2] Langenberger *v.* Kroeger, 48 Cal. 147; Brooks *v.* Allen, 62 Ind. 401; Ætna Ins. Co. *v.* Winchester, 43 Conn. 391.

[3] See Brooks *v.* Allen, and Ætna Ins. Co. *v.* Winchester, *supra.*

[4] Belknap *v.* National Bank, 100 Mass. 376, 381; Greenfield Bank *v.* Stowell, 123 Mass. 196, 203.

[5] Belknap *v.* National Bank, *supra.*

[6] Ætna Ins. Co. *v.* Winchester, 43 Conn. 391.

[7] Id.; Brooks *v.* Allen, 62 Ind. 401.

if the other maker has already signed, is a destruction of the instrument towards the latter.[1]

Thus far of the meaning of the term "material alteration." But suppose that the defendant, being maker of a promissory note, or drawer of a bill of exchange or a check, has facilitated the alteration, — as, for example, by leaving a blank space in the instrument which has afterwards been fraudulently filled out, — is he now estopped or barred from setting up the alteration? It must be understood that the case under consideration is one in which the instrument left the hands of the maker or drawer as a completed instrument; cases of intrusting one's blank signature or one's signature to an uncompleted instrument stand upon a very different footing, as will be seen in another place.

It has sometimes been held that if the maker or the drawer, by leaving a blank, has made it easy for the wrong-doer to fill the blank, and so alter the instrument, he rather than the *bona fide* holder for value must bear the loss. This is commonly put upon the ground of (supposed) negligence, sometimes upon the ground that, of two innocent parties, he who occasioned the loss must bear the loss. The last is at best but a very imperfect statement of law, and cannot be taken as satisfactory in any such case; and the first, the ground of negligence, finds an answer in what has elsewhere been said in regard to delivery, — to wit, the negligence, if it be admitted that there is negligence, is not the legal, otherwise called the proximate, cause, in ordinary cases, of the alteration. To be the legal cause of what was done, the negligence must have been in or in immediate connection with the alteration: the alteration must have been the natural or the probable result of the negligence.[2]

Though there are then cases to the contrary,[3] it may be safely

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[1] Wood *v.* Steele, 6 Wall. 80; Greenfield Bank *v.* Stowell, 123 Mass. 196; Wood *v.* Draper, 112 Mass. 315.

[2] In a case of the fraudulent transfer of stock by the plaintiffs' clerk, Bowen, L. J., said: "The proximate cause" — that is, the legal cause — "was the felony and crime" of the clerk, "and it cannot be said that the felony was either the natural, or likely, or necessary, or direct consequence of the carelessness of the plaintiffs." Merchants of the Staple *v.* Bank of England, 21 Q. B. Div. 160. See also Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389; Swan *v.* North British Co., 2 Hurl. & N. 175, 182; Arnold *v.* Cheque Bank, 1 C. P. Div. 578; Bigelow, Estoppel, 655, 656, 5th ed.

[3] Isnard *v.* Torres, 10 La. An. 103; Capital Bank *v.* Armstrong, 62 Mo. 59; Iron

stated that in principle, and by the weight of authority, a material alteration by a party or by one in lawful possession made in a note, bill, or check delivered as a completed instrument, by writing or printing words in a blank space, destroys the instrument, so that no action can be maintained against the maker or drawer or other non-consenting parties, even by a *bona fide* holder for value.[1] Nor does it make any difference whether the blank was left in the body or at the end of the instrument. For example: The plaintiff is a *bona fide* holder for value of a promissory note sued upon, purporting to have been signed by the defendant as maker, and containing at the end the words "10 per cent." What the defendant did sign was the instrument in question, without those words, delivering the same as a completed undertaking. The instrument signed closed with the words "with interest at," after which there was a blank, which after delivery to the payee was filled in with the words above quoted, "10 per cent." The defendant is not liable, the alteration having the effect to destroy the instrument.[2]

The contrary view, which has found favor in some of our courts, appears to have been based originally upon a misunderstanding of the effect of a decision of the English Common Pleas in relation to a blank space left in a check just before the amount for which the check had been made payable; the drawer's clerk, *by whom* the check was drawn, and to whom the check was then intrusted to obtain payment, having raised the sum payable by writing certain words in the blank.[3] But the contest there was between the drawer of the check and his banker, the drawee. No case arose of the claim of a *bona fide* holder for value; and though it was held that the drawer must under the circumstances bear the loss, nothing was said about estoppel. Moreover, there was something approaching agency in the facts.[4] The case is therefore no authority for the position upon which some courts have acted, that the drawer of a check or bill, or the maker of a note, is estopped or barred from setting up the alteration in a suit by the holder of the instrument.

Mountain Bank *v.* Murdock, Id. 70; Redington *v.* Woods, 45 Cal. 406. See also Worrall *v.* Gheen, 39 Penn. St. 388.

[1] Holmes *v.* Trumper, 22 Mich. 427; Greenfield Bank *v.* Stowell, 123 Mass. 196, and cases reviewed therein.

[2] Holmes *v.* Trumper, *supra*. See also McGrath *v.* Clark, 56 N. Y. 34. But see Redlich *v.* Doll, 54 N. Y. 234, and *quære*.

[3] Young *v.* Grote, 4 Bing. 253.

[4] See Holmes *v.* Trumper, *supra*; Greenfield Bank *v.* Stowell, *supra*.

The English courts, followed by some of the ablest of our own, have plainly repudiated the idea of any estoppel, and have declared that the decision must be understood as confined in its bearing to questions arising upon facts of the same nature.[1] The case, if to be regarded as rightly decided, is clearly distinguishable from cases such as we have been considering.[2]

It has well been questioned whether the leaving of blanks can ordinarily amount to negligence at all, not to say negligence the legal cause of the loss; for it is impracticable to execute an instrument, in ordinary business, without leaving blanks somewhere. There must be a blank at the beginning or at the end, unless — what not the most careful man ever does — a line is drawn before the first word and after the last, clean to the signature. Universal practice cannot be negligence.[3]

Marginal terms, such as conditions, stipulations, and the like, not being mere memoranda of facts, such as the consideration, — in other words, marginal terms which are intended to be part of the written contract, — are treated by the better authorities as inseparable from the main writing to which the signature is given. And it makes no difference whether such marginalia are signed or not. Accordingly, to remove such terms, by cutting them off or in any other way, without consent, will be fatal. There is no distinction by the better authorities, for there are decisions to the contrary, between cases of that sort and cases of the alteration of

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[1] Swan *v.* North British Co., 2 Hurl. & C. 175, 189, 190; Halifax Union *v.* Wheelwright, L. R. 10 Ex. 183, 192; Arnold *v.* Cheque Bank, 1 C. P. Div. 578, 587, 588; Greenfield Bank *v.* Stowell, 123 Mass. 196, 200, 201; Holmes *v.* Trumper, 22 Mich. 427; L. C. 544, 551, 552.

[2] The check had been left in blank entirely, save signature, by the drawer with his wife for her use in his absence, and the wife *employed* the clerk to fill in the sum required. He did so, skilfully leaving the blank before "fifty," written with a small "f;" and then, being intrusted with the check to draw the money, he wrote in the words mentioned. That point is dwelt upon in Holmes *v.* Trumper, *supra*, as a "very important circumstance." The court there says: "The check was filled up by the plaintiff's clerk, the alteration made and the money drawn by him in person, and the plaintiff, by *employing him* [italics by the court], as he did, as his clerk and (through his wife) as his agent to fill the check and in person to draw the money from the bankers, might well be held to have placed a confidence in him for which he should be responsible, or at least to have authorized the bankers to place confidence in him." And so the court itself in Young *v.* Grote distinguish Hall *v.* Fuller, 5 Barn. & C. 750, decided directly the other way. See also Greenfield Bank *v.* Stowell, *supra*.

[3] See the language of the court in Holmes *v.* Trumper, *supra*, and the quotation from it in Greenfield Bank *v.* Stowell, *supra*.

language in the body of the signed instrument. The instrument signed has been destroyed, and no action upon it can be maintained either in its present or in its original form.[1] And the same is plainly true of the cutting in two of instruments dexterously constructed, so as by cutting through them at a particular place one part will be left in form a perfect contract, different in effect from the instrument uncut.[2] In cases such as these there is ordinarily not even the semblance of negligence; and it is difficult to conceive how the defendant can be treated as having assented, or how he can be barred from showing that he never assented to the supposed contract.

Still another case of want of contract arises where between the plaintiff and the defendant there is a forged indorsement. Each person who signs a negotiable contract of the law merchant undertakes to pay to any one who acquires title according to the law merchant. That law requires, not that every intervening holder of the paper between the plaintiff and the defendant should have been owner of the instrument, or even the lawful holder of it, but that every intervening indorsement should be genuine. The holder may have a good claim against later indorsers; back of the forged indorsement he cannot go, for want of legal assent on the part of the signers.[3] For example: The plaintiffs sue the defendants to recover the amount paid by mistake by the plaintiffs as acceptors to the defendants as holders of a bill of exchange payable to A, whose indorsement had been forged. The defendants were *bona fide* holders for value. The plaintiffs are entitled to recover.[4]

There are one or two nominal exceptions to this rule. The maker of a note, or the drawer of a bill or a check, can make it payable to whomsoever he will; and if he makes it payable to a person having no interest in it he may indorse that person's name,

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[1] Gerrish *v.* Glines, 56 N. H. 9; Johnson *v.* Heagan, 23 Me. 329; Shaw *v.* First Methodist Soc., 8 Met. 223; Fletcher *v.* Blodgett, 16 Vt. 26; Bay *v.* Shrader, 50 Miss. 326; Benedict *v.* Cowden, 49 N. Y. 396; Bank of America *v.* Woodworth, 18 Johns. 315; s. c. 19 Johns. 391; Brill *v.* Crick, 1 Mees. & W. 232. See also Franklin Sav. Inst. *v.* Reed, 125 Mass. 365; Benthall *v.* Hildreth, 2 Gray, 288; Heywood *v.* Perrin, 10 Pick. 228. But see Cornell *v.* Nebeker, 58 Ind. 425; Nebeker *v.* Cutsinger, 48 Ind. 436; Zimmerman *v.* Rote, 75 Penn. St. 108; Brown *v.* Reed, 79 Penn. St. 370.

[2] Brown *v.* Reed, *supra.*

[3] Canal Bank *v.* Bank of Albany, 1 Hill, 287; Hortsman *v.* Henshaw, 11 How. 177; Arnold *v.* Cheque Bank, 1 C. P. D. 578.

[4] Canal Bank *v.* Bank of Albany, *supra.*

and put the instrument into circulation. So far as the question of liability upon the instrument is concerned, it would make no difference whether the maker or drawer had the authority of the payee to indorse his name or not; because, having once used the payee's name for the purpose of putting the paper into circulation, he could not afterwards deny his right to do so. Indeed, it could not affect the case that the payee was a party in interest, so far as the liability of the maker or drawer, on the instrument, is concerned. The act might be unlawful for other purposes; but in a suit upon the instrument the defendant could not allege that he had forged the payee's name. For example: The plaintiff is suing to recover the amount of a bill of exchange paid by him as acceptor to the defendant, a *bona fide* holder for value, one of the drawers of the bill having forged the payee's name and procured a discount of the bill. The plaintiff did not know of the forgery when he paid. He is not entitled to recover.[1]

The example, it will be observed, goes a step further than the rule just stated. But the reason is obvious: the acceptor had paid according to the order of the drawer. Such payment entitled him to charge the sum to the drawer; and, as we have seen, where the acceptor (or drawee) can do that, his act of acceptance (or payment) is binding. In such a case, then, the *bona fide* holder for value has a valid claim back of the forged indorsement, contrary to the rule in ordinary cases.

Forgery of the signature of the drawer of a bill of exchange stands upon a footing of its own. Were it not for a special rule of law, founded upon the natural effect of acceptance, the case would be in no wise peculiar, and the courts would therefore hold that no action could be maintained against the acceptor by any person. But the drawer and the drawee are, or they are conclusively assumed to be, correspondents; they are ordinarily in close business relations, the drawee usually holding funds of the drawer, and often being his banker. The drawee is therefore presumably familiar with the hand of the drawer, and when he accepts a bill purporting to be the drawer's, he thereby asserts or admits that

[1] Coggill *v.* American Bank, 1 Comst. 113. See Hortsman *v.* Henshaw, *supra.* Where the paper is payable to a fictitious party, it may, it seems, be treated as payable to bearer. See Coggill *v.* American Bank, *supra;* Cooper v. Meyer, 10 Barn. & C. 468; s. c. 5 Man. & R. 387; Minet *v.* Gibson, 3 T. R. 81; s. c. 1 H. Black. 569; Bank of England *v.* Vagliano, 1891, A. C. 107.

the signature is the genuine signature of the drawer. That may well have misled a purchaser of the bill; and the law therefore holds the acceptor, by reason of his acceptance, estopped to deny his liability to a purchaser who is a *bona fide* holder for value; the acceptance in such a case is binding, notwithstanding the fact that the drawer's signature is a forgery. For example: The plaintiff sues to recover the amount of a bill of exchange which as acceptor he has paid to the defendant, a *bona fide* holder for value, who had discounted the bill after acceptance. The drawer's signature is forged, but the plaintiff did not know the fact when he accepted. The plaintiff is not entitled to recover; it was his duty to satisfy himself of the drawer's hand before acceptance, and his acceptance is a conclusive admission in favor of the defendant of the genuineness of the signature.[1]

The case from which the example is taken went still further. Another bill had been paid by the plaintiff on presentment without acceptance, the defendant having *already* taken it; and the same rule was applied, — the plaintiff was not allowed to show that the drawer's signature had been forged. The case, therefore, appears to go the length of holding the drawee bound by his act, whether of acceptance or payment, though that act could not have misled the holder into his purchase of the bill. The rule would then be unbending; acceptance or payment would in itself be binding in favor of a *bona fide* holder.

The later authorities appear to repudiate that doctrine, and to put the case on the ground which the example fairly implies, — of estoppel. That is to say, acceptance binds the drawee in favor of a *bona fide* holder for value who took the bill after the acceptance, but not in favor of one who took it before acceptance.[2] That is probably the right view. Practice of the parties or usage may also affect the case. Thus it is laid down that the acceptor may allege the want of genuineness of the drawer's signature, if he can show that by a settled course of business between the parties, or by a general custom of the place, the holder took upon himself the duty of exercising some particular precaution to prevent the loss, and failed of performing that duty.[3] So, also, it has been held that if

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[1] Price *v.* Neal, 3 Burr. 1354. That is the leading case, and it has had a long following. See Bigelow, Estoppel, 481 *et seq.*, 5th ed.

[2] McKleroy *v.* Southern Bank, 14 La. An. 458. See Bigelow, Estoppel, 419, 5th ed.

[3] Ellis *v.* Ohio Ins. Co., 4 Ohio St. 628.

the holder himself indorsed the paper, as for collection, before it was presented to the drawee, the drawee will not be estopped from alleging that the drawer's signature was forged, because now the holder is thought to have asserted the genuineness of the bill, and to have misled the drawee.[1] And, again, if the owner of the bill in presenting it to the drawee withhold from him important information which the former has touching the question of genuineness, the acceptance will not be binding.[2]

It should be remembered that the estoppel goes no further than to cut off the acceptor's right to set up the want of genuineness of the drawer's signature, and that his acceptance does not preclude him from asserting that other signatures, with an exception above mentioned (where the drawer indorses the payee's name), are not genuine, or that the body of the bill has been altered.

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1 National Bank of N. A. *v.* Bangs, 106 Mass. 441.

2 First National Bank *v.* Ricker, 71 Ill. 439.